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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE; JANE DOE, #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE; AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE*, IN SUPPORT OF NEITHER PARTY

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BRIEF OF STUDENT PRESS LAW CENTER, *AMICUS CURIAE*, IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE[1]

The Student Press Law Center ("SPLC") is a national, not-for-profit, incorporated, legal research, information

[1] Both Petitioner and Respondent have consented to the filing of this brief. No person or entity other than the Student Press Law

and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free press rights. Since its founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on freedom of expression, freedom of information and other media-related legal issues of interest to the student press and has produced numerous publications on these topics. Among those issues is the effort by school officials at high schools, colleges and universities to censor student speech, including student expression on religious issues, in the context of school-sponsored activities such as student media. As the only national organization devoted exclusively to student press freedom, the SPLC acts as a source of free information for student journalists, and in 1998, for example, provided assistance to nearly 1,600 student journalists, their advisers and interested others. The SPLC has submitted numerous *amicus curiae* briefs to courts around the country, including briefs before this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The Court's decision in this case will have a direct impact on the manner in which high school officials around the nation interpret the Establishment Clause of the United States Constitution. Indeed, the SPLC has received numerous requests for assistance from student journalists who have had a wide range of religious material censored from their school-sponsored publications because of school officials' concerns about Establishment Clause violations. Because of the effect this case will have

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Center, its supporters, or its counsel has made a monetary contribution to the preparation or submission of this brief.

on the ability of students to express themselves on religious issues in a variety of school-related contexts, including student publications and other student media, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the facts of the case as presented by the Court of Appeals in its decision.

SUMMARY OF ARGUMENT

In this case, the Court is asked to decide whether petitioner's policy permitting student-initiated, student-led prayer at football games violates the Establishment Clause of the First Amendment. Without taking a position on the constitutionality of the particular policy implemented by the Santa Fe School Board, *amicus* focuses on potential ramifications that a broad affirmance of the holding by the United States Court of Appeals for the Fifth Circuit might have on student religious expression in the context of school-sponsored student media. *Amicus* asks the Court to make clear that—whether or not petitioner's policy violates the Establishment Clause—where students initiate and control the content of religious expression in the context of student media, such religious expression does not violate the Establishment Clause.

ARGUMENT

WHETHER OR NOT THE COURT CONSIDERS STUDENT-INITIATED AND STUDENT-LED PRAYER AT A HIGH SCHOOL FOOTBALL GAME TO BE A VIOLATION OF THE ESTABLISHMENT CLAUSE, STUDENT RELIGIOUS EXPRESSION IN THE CONTEXT OF SCHOOL-SPONSORED STUDENT MEDIA WOULD NOT CONSTITUTE SUCH A VIOLATION

In holding petitioner's policy permitting student-initiated, student-led prayer at football games (the "Football Policy") unconstitutional, the Court of Appeals found that

the type of event at issue was controlling. Football games, the Court of Appeals found, are "hardly the sober type of annual event that can be appropriately solemnized with prayer." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999), *reh'g denied*, 171 F.3d 1013 (5th Cir. 1999), *cert. granted in part*, 120 S. Ct. 494 (Nov. 15, 1999) (No. 99-62). Distinguishing its holding in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), which upheld a policy allowing student-selected, student-given, nonsectarian prayers at high school graduations, the Court of Appeals found that the non-solemn setting of football games could not constitutionally support prayers read over a public address system. *Doe*, 168 F.3d at 823.

Because the record appears unclear regarding whether the religious expression at issue here truly was student-initiated, *amicus* does not take a position on the outcome of the case. However, if the Court agrees that the analysis used by the Court of Appeals controls the issue before it, or determines that the Football Policy violates the Establishment Clause under some other analysis, the Court should be sensitive to the implications of such a holding for other situations. Such a holding should not in any way preclude students from expressing religious ideas in the context of school-sponsored student media. That is, whether the Court upholds the conclusion that student-initiated prayer at "frequently-recurring, informal, school-sponsored events" runs afoul of the Establishment Clause, *see Doe*, 168 F.3d at 823, that finding should not be interpreted as preventing students from publishing articles on religious issues or opinion pieces on personal religious beliefs in the student newspaper, yearbook, online publication or any other student-edited media.

Already, the SPLC has received numerous requests for assistance from student journalists who have had

a wide range of religious material censored from the pages of their school-sponsored student publications because of school officials' concerns about Establishment Clause violations. Student yearbook staffs have been told they could not include a picture of the Fellowship of Christian Athletes in the organization section of their publication. Editors of student newspapers have been prohibited from publishing feature stories about religious holiday celebrations of people of different faiths. Some have even been told that they cannot mention the word "Christmas" in the pages of their publication. Student-edited magazines have been punished because they accepted advertisements for local churches or religious youth groups.

In each of these cases, the student editors or staff of the publications wanted to publish the material in question. But school officials, solely because of the fear of Establishment Clause lawsuits, forbade them from doing so.

The nature and purpose of the student media often will distinguish such speech from student expression in other contexts. First, student journalists, acting on their own, are not state actors and, thus, their conduct cannot violate the Establishment Clause. Second, the government may not discriminate against speech solely on the basis of its religious viewpoint.

A. Because Student Journalists, Acting on Their Own, Are Not State Actors for Purposes of the First Amendment, Student Publication of Religious Expression Does Not Violate the Establishment Clause

Student writers and editors on school-sponsored student publications are not state actors when their editorial judgment is not attributable to school officials. *Yeo v. Town of Lexington*, 131 F.3d 241, 250 (1st Cir. 1997), *cert.*

denied, 118 S. Ct. 2060 (1998) (no state action in refusal of high school student newspaper and yearbook editors to publish advertisements where students exercised "independent" editorial judgment); *Sinn v. The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (no state action in refusal of student newspaper editors to print advertisement); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) (complaint did not provide plausible basis for inferring student editors were state actors in rejecting advertisement); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (no state action where university officials did not exercise supervision or control and students selected the newspaper's editor). Unless there is state action, courts may not impose constitutional obligations on private actors. *Yeo*, 131 F.3d at 248-49. Thus, there can be no violation of the Establishment Clause where the speech at issue is purely private speech. Although the analytic models used in state action decisions vary depending on the claims asserted, "[t]he essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury." *Id.*

As this Court has recognized, even when students are in the public schools, they are private citizens. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). Only under limited circumstances do their actions become attributable to the state. Every court of appeals to consider the question of whether student-controlled editorial decisions are attributable to public officials has found no state action. *Yeo*, 131 F.3d at 250; *Sinn*, 829 F.2d at 665; *Leeds*, 85 F.3d at 55; *Mississippi Gay Alliance*, 536 F.2d at 1075. For example, in *Yeo*, the court found that the decisions made by high school student editors not to publish certain advertisements did not involve state

action where (i) the students made and controlled the decisions; (ii) the school administration had no legal duty to control the content of the editorial judgments of the student editors; and (iii) the actions by the students were not "fairly attributable" to the school. This was so even though the decisions took place in a public school setting, the student publications received some governmental funding, teachers were acting as advisers to the publications, and the school administrators made an educational judgment to respect the students' independent editorial decision. *Yeo*, 131 F.3d at 251-54.

Similarly in *Leeds*, the court found no state action in connection with a decision by a student editor of a state-supported law school newspaper to refuse to publish an advertisement. "[T]he state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor." *Leeds*, 85 F.3d at 54. Even where a student newspaper receives significant public funding, no state action exists where the paper maintains editorial freedom from the state. *See Sinn*, 829 F.2d at 665; *see also Mississippi Gay Alliance*, 536 F.2d at 1075.[2]

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[2] While the *Leeds*, *Sinn*, and *Mississippi Gay Alliance* cases occur at the college level, they remain relevant and persuasive in the high school context where students are given autonomy similar to that enjoyed by university students. *See Yeo*, 131 F.3d at 251. The holding of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), does not alter this analysis. While *Hazelwood* determined that a public high school *may* exercise content control over a student newspaper under certain, limited circumstances, it did not *mandate* that administrators do so. Certainly, school administrators concerned about fostering democratic principles through the teaching of journalism skills will choose to establish editorially independent student media. *See Yeo*, 131 F.3d at 250 (Determination by school officials that "the best way to teach journalism skills is to respect in the students' editorial judgments a degree of autonomy similar to that exercised by professional journalists. That choice by the officials parallels the allocation of responsibility for editorial judgments made by the First Amendment.").

It is clear that where students control the content of school-sponsored media, no state action is involved. Even where the student media bears the imprimatur of the school—for example, because the publication is identified as being affiliated with the school, the publication receives funding from the school, or the students produce the publication on school grounds—there is no state action if the students exercise editorial judgment independently of faculty members or the school adminstration. *See Yeo*, 131 F.3d at 250 (recognizing that state action analysis does not turn on whether school-sponsored activity bears imprimatur of school). Therefore, if students decide to include religious expression in a student publication, that decision would not involve state action and would not violate the Establishment Clause.[3] Of course, in order to avoid Establishment Clause problems, the expression must truly be student-initiated and student-led. A "sham" system in which school officials retain ultimate control over student expression would not pass constitutional muster.

B. Even If State Action Is Implicated, the Government May Not Discriminate Against Speech Solely on the Basis of Its Religious Viewpoint

Student religious expression in the context of student media may not be prohibited or limited because to do so would constitute viewpoint discrimination. This Court has consistently held that the government may not rely on the Establishment Clause to restrict religious speech based on viewpoint when the government has created any kind of forum for the expression of privately held views. *See, e.g., Rosenberger v. Rector & Visitors of*

[3] Moreover, religious expression in student media should not be restricted to "nonproselytizing, non-sectarian opinions," a standard which has no basis in this Court's Establishment Clause precedent.

the Univ. of Va., 515 U.S. 819, 837-46 (1995) (holding that public university unconstitutionally excluded a religious viewpoint when it denied funding to a Christian student newspaper); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993) (holding that a public school could allow after-hours access to its facilities to a religious organization when the school had made its facilities available to a wide variety of organizations); *Board of Education of Westside Community Sch. v. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality) (holding that a high school could permit a student to form a Christian club subject to the same privileges and conditions as other school clubs); *Widmar v. Vincent*, 454 U.S. 263, 270-77 (1981) (holding unconstitutional a university policy prohibiting student religious groups from using university facilities).

Most recently, the Court confirmed that the neutrality of a government program is a "significant factor in upholding [it] in the face of Establishment Clause attack." *Rosenberger*, 515 U.S. at 839. In *Rosenberger*, the Court held that the University of Virginia's denial of student activities funds to a Christian student newspaper was "viewpoint discrimination" prohibited by the First Amendment. *Id.* at 845. With regard to the university's argument that funding the Christian newspaper would violate the Establishment Clause, the Court held that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 839.

In contrast to the Football Policy struck down by the Fifth Circuit, a school policy allowing students the freedom to discuss religious, political or social issues in student publications satisfies the neutrality requirement set

forth in *Rosenberger*.[4] Permitting free expression of religious viewpoints in the student media is neutral because it is not intended to advance religion but instead has the secular purpose of "open[ing] a forum for speech," *Rosenberger*, 515 U.S. at 840, in order to further the school's educational mission. *See Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998) (holding that school board policy permitting private political, religious and social organizations to set up tables on school property and give away informational literature to students, including Bibles and other religious material, was adopted for secular purpose of opening a forum for speech). This Court has repeatedly held that an "open-forum policy, including nondiscrimination against religious speech, [has] a secular purpose." *Widmar*, 454 U.S. at 271 (footnotes omitted); *Mergens*, 496 U.S. at 248 (plurality). Whether a student writes an article about the celebration of Christmas, Hanukah or Ramadan, an opinion column about the experience of being "born again," or a letter to the editor espousing the virtues of atheism, the school will not be viewed as elevating any particular religious speech to a preferred status.

Unlike formal commencement exercises or sporting events, student publications are designed to be forums for the expression of diverse opinions on any subject matter that interests student writers. Readers of a student newspaper or magazine can evaluate the information and arguments presented therein, and those who disagree may respond by writing letters, opinion columns or other articles that express divergent viewpoints. As

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[4] The degree of solemnity in a school-sponsored activity—critical to the Court of Appeals' decision to strike down the Football Policy, *see Doe*, 168 F.3d at 823—should not be a factor in determining whether allowing students to engage in religious expression in student publications violates the Establishment Clause.

long as the religious content of such publications is dictated solely by students, a public school would not violate the Establishement Clause by permitting publication on a religion-neutral basis, even if students choose to publish articles discussing religious issues or columns espousing particular religious beliefs. *See Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297-98 (7th Cir. 1993) (school district policy prohibiting students from distributing religious materials violated First Amendment). Therefore, while the secular purpose of encouraging students to deliver formal prayers during football games may be questionable, *see Doe*, 168 F.3d at 812, the secular purpose of permitting a broad range of religious discussion in the student media is clear.

A school also can eliminate any mistaken impression that articles, editorials or columns appearing in student-produced media represent the views or endorsements of school officials. The Court stated in *Mergens* that "[t]o the exent a school makes clear that its recognition of [a student religious club] is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251 (plurality) (citation omitted). The Court in *Mergens* acknowledged that treating the speech of religious clubs at a high school as private religious expression would permit the clubs "access to the school newspaper, bulletin board, the public address system, and the annual Club Fair." *Id.* at 247, 250-51. Significantly, the Court did not find that this access to student media by student religious organizations would constitute government endorsement of religion. *Id.*

In *Rosenberger*, as well, the Court concluded that the university did not foster any mistaken impression that the

views printed in the student publications it funded were its own; the university explained to student publishers that funding should not be misinterpreted as responsibility for, or approval of, content. *Rosenberger*, 515 U.S. at 823-24. The university also required students to publish a written disclaimer indicating that the publications were independent of the university. *Id.* Similarly in a high school setting, administrators can stress that decisions regarding the content of newspapers, yearbooks and other student-produced publications are left solely to the students. *See Mergens*, 496 U.S. at 250-51 (recognizing that secondary school students are capable of distinguishing between a school's equal access policy and active school endorsement of religion); *Wauconda*, 9 F.3d at 1298-1300 (finding that even junior high school students could appreciate the distinction between public and private religious speech).

Finally, a school's decision to allow students to express their views on religion in student publications in no way coerces or pressures students to participate in a religious activity. *See Mergens*, 496 U.S. at 261 (Kennedy, J., concurring in part and concurring in the judgment). The student media encompasses a full range of expressions, ideas and political and religious beliefs, which students are free to accept or ignore.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should not extend to student-initiated religious expression in student newspapers and other media.

Respectfully submitted,

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